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## **A NEW, BALANCED SYSTEM OF DETENTION: AN ANALYSIS OF NEAL KATYAL AND JACK GOLDSMITH'S PROPOSAL FOR "A TERRORISTS' COURT"**

Leah Ceee O. Boomsma<sup>†</sup>

Just months after 9/11, Professor Neal Katyal was reading the *New York Times* over breakfast when he learned of President Bush's order for military commissions.<sup>1</sup> Two days later, Katyal entered his constitutional law class at Yale Law School and said, "I found something that I think is unconstitutional and the court should say so."<sup>2</sup>

Since that time, Katyal has acted on his beliefs. In 2005, he presented his opinions at William Mitchell College of Law's forum on "Special Tactics for a Secret War." Katyal asserted that the President was trying to create a unilateral and unchecked power to act outside the Constitution and international treaties.<sup>3</sup> Then, after four years and 5,000 pro bono hours,<sup>4</sup> Katyal argued this opinion to the highest court in the nation, and won.<sup>5</sup>

Katyal's victory at the United States Supreme Court was only the first step. He has continued to advocate for improvements to the terrorist trial system.

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<sup>†</sup> J.D. Candidate, William Mitchell College of Law, 2009. The author would like to thank Professor A. John Radsan for his valuable advice, the staff from the *Journal of the National Security Forum* for all their work and assistance, and her family, including her husband Don Boomsma, father Kerry Doyle, and sister-in-law Gwen Mitchell-Doyle, for their encouragement and input.

1. Marie Brenner, *Taking on Guantanamo*, VANITY FAIR, Mar. 2007, at 334 (describing the legal and personal challenges overcome by Charles Swift and Neal Katyal while contesting the President's military tribunals).

2. Neal Katyal, Professor of Law, Georgetown University, Remarks at William Mitchell College of Law National Security Forum: Special Tactics for a Secret War (Oct. 28, 2005) (audio available at <http://www.wmitchell.edu/multimedia/?file=NSF/2005-10-28-Special-Tactics-for-a-SecretWar.mp3&title=Special%20Tactics%20for%20a%20Secret%20War>).

3. *Id.*

4. David McKay Wilson, *A Patriot's Act*, DARTMOUTH ALUMNI MAG., July/Aug. 2006, at 34 (profiling Neal Katyal as the pro bono attorney in *Hamdan v. Rumsfeld*).

5. Brenner, *supra* note 1, at 334.

I. *HAMDAN V. RUMSFELD*: THE IMPETUS FOR REFORM

Because of his concerns about the constitutionality of the Guantanamo detainment, Katyal agreed to represent Salim Hamdan. When Hamdan asked why he was so dedicated the case, Katyal responded, "I'm doing it for you because my parents had come from India to America because of a simple reason . . . America doesn't treat people differently because of where they come from."<sup>6</sup> He later expanded, "[w]e fought a civil war in part about the idea that all people are guaranteed certain rights, and chief among those is a right to a fair trial."<sup>7</sup>

Because of Katyal's ceaseless efforts to protect the right to a fair trial, in *Hamdan v. Rumsfeld* the Supreme Court rendered the President's military commissions illegal.<sup>8</sup> In the moments following the decision, a senator who approached Katyal to congratulate him proclaimed, "[s]oon we are going to have real trials that the nation can be proud of."<sup>9</sup> In the wake of *Hamdan*, however, Congress merely replaced the President's military commissions with a system of its own design. Despite the Military Commissions Act (MCA),<sup>10</sup> military commissions continued to draw extensive criticism from many, including Katyal.

A year later, Katyal joined his political opposite, Jack Goldsmith, in a proposal for "real" trials to deal with terrorists. The proposal became known as "A Terrorists' Court."<sup>11</sup> It is a bipartisan call for the United States to rethink the structure of detainment and initiate discussion within the executive and legislative branches to create a sensible, congressionally-approved institution for trying and detaining terrorists.<sup>12</sup>

As the senator told Katyal, the time has come for a new system of detaining and prosecuting alleged terrorists that gives not just the appearance, but also the reality of humane treatment under

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6. *Law Professor Beats the Odds with High Court Win* (NPR broadcast Sept. 5, 2006), transcript available at <http://www.law.georgetown.edu/faculty/nkk/documents/npr.pdf>.

7. *Id.*

8. See *Hamdan v. Rumsfeld*, 126 S.Ct. 2749, 2798 (2006).

9. Brenner, *supra* note 1, at 339.

10. Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (2006).

11. Jack L. Goldsmith & Neal Katyal, *The Terrorists' Court*, N.Y. TIMES, July 11, 2007, at A19.

12. *Id.*

the law.<sup>13</sup> Concluding his presentation at William Mitchell College of Law in October of 2005, Katyal stated, “it’s time for Congress to step up to the plate,” meaning it is time to institute a long-term solution for detainment that will rebuild the United States’ reputation both internationally and domestically.<sup>14</sup>

## II. THE DILEMMA: BALANCING NATIONAL SECURITY AND JUDICIAL INTEGRITY

The significant challenge in dealing with terrorist detainment is balancing national security imperatives with the interest of fairness and integrity in the judicial process.<sup>15</sup> The two existing systems in which terrorists could be tried or detained fall on opposite extremes of this scale. “Neither the criminal nor the military model in its traditional guise can easily meet the central legal challenge of modern terrorism: the legitimate preventive incapacitation of uniformless terrorists who have the capacity to inflict mass casualties and enormous economic harms and who thus must be stopped before they act.”<sup>16</sup> The detainment system in Guantanamo employs the executive-created military commissions that seek to protect the nation from some of its worst security threats. However, this protection comes at a cost; since the war has no obvious end there is a risk of “erroneous long-term detentions”<sup>17</sup> that sacrifice individual freedom, right to trial, and judicial integrity. As an alternative, the federal criminal court system offers a full range of legal protections for a defendant including a presumption of innocence and a high standard of proof. But being ill-equipped to protect the nation from security threats through a system of preventative detainment, these protections are still not enough. Neither option provides a long-term, sustainable system for trying, charging, and detaining terrorists.

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13. Glenn Sulmasy, *The National Security Court: A Natural Evolution*, JURIST: LEGAL NEWS & RES., May 11, 2006, available at <http://jurist.law.pitt.edu/forumy/2006/05/national-security-court-natural.php>.

14. Katyal, *supra* note 2.

15. Andrew C. McCarthy, *Abu Ghraib & Enemy Combatants*, NAT’L REV., May 11, 2004, <http://article.nationalreview.com/?q=NTZjNWFjNmEzYzA5ZDIhZWlWMDU2MTc0YmEwODFjY2U=>.

16. Robert M. Chesney & Jack L. Goldsmith, *Terrorism and the Convergence of Criminal and Military Detention Models*, 60 STAN. L. REV. (forthcoming 2008) (manuscript at 2, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1055501](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1055501)).

17. *Id.*

Guantanamo Bay has put the United States on the defense. A former State Department official, Matthew Waxman, reasons that “[e]ven if Guantanamo Bay could be defended in legal or moral terms, it still hurts us more than it helps us in battling al-Qaeda.”<sup>18</sup> While Guantanamo Bay benefited the United States by “incapacitat[ing] many al-Qaeda plotters and has given the U.S. Government a better picture of the enemy . . . those benefits came at a serious cost.”<sup>19</sup> In Waxman’s experience, he “often spent valuable time and diplomatic capital fruitlessly defending our detention practices rather than fostering counterterrorism teamwork.”<sup>20</sup> He found that the harmful reputation created by Guantanamo Bay “leaves us playing defense and hinders our ability to play effective offense.”<sup>21</sup> It has detracted from the United States’ ability to provide leadership and policy guidance in the global arena.<sup>22</sup>

Since Guantanamo Bay does not provide a long-term resolution for dealing with terrorists, but instead creates a harmful reputation that undermines the United States’ alliances and provides yet another al Qaeda propaganda tool, many call for its closure. Even President Bush has commented on the desire to see the detainment site closed “if he could do so without putting Americans in greater danger.”<sup>23</sup> That danger includes the uncertainty of what to do with the dangerous detainees in Guantanamo Bay.<sup>24</sup> Often times other nations will not accept the return of these dangerous individuals, or, if they do, some will mistreat them while others might even release them.<sup>25</sup>

In the eagerness to close the Guantanamo Bay detention facility, some have looked to the federal criminal courts as an alternative means of dealing with terrorists. In some cases, these courts have successfully convicted alleged terrorists of crimes previously committed. However, the structure of the criminal courts is not well-suited to handling terrorists’ trials in the long-

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18. Matthew Waxman, *The Smart Way to Shut Gitmo Down*, WASH. POST, Oct. 28, 2007, at B04.

19. *Id.*

20. *Id.*

21. *Id.*

22. Sulmasy, *supra* note 13.

23. Waxman, *supra* note 18.

24. Kelly Anne Moore, *Take Al Qaeda to Court*, N.Y. TIMES, Aug. 21, 2007, at A19.

25. Waxman, *supra* note 18.

term, especially when it comes to trials for detainment.

Kelly Ann Moore, former chief of the Violent Crimes and Terrorism Section of the U.S. Attorneys' Office in the Eastern District of New York, purports that the federal system has a proven track record of handling complex terrorist prosecutions. She previously worked on terrorism-related cases as a federal prosecutor and has worked closely with the prosecution of two Yemeni citizens who conspired to send money to members of al Qaeda and Hamas in support of terrorist activities. Even though Moore successfully convicted the defendant-terrorists in that trial, the complex issues posed by terrorist cases remain evident.

One such issue was the admission of classified evidence. Moore admits that, generally, most classified evidence can be used so long as it is either declassified or covered by a protective order. Otherwise, as happened with some of the evidence in Moore's case, the prosecution would have to exclude the classified evidence. Katyal and Goldsmith recognize that in many cases "the evidence against a particular detainee may be too difficult to present in open civilian court without compromising intelligence sources and methods."<sup>26</sup>

The issue of dealing with classified evidence is just one example of the challenges posed by trying terrorists in federal court. Robert Chesney, in a collaborative article with Goldsmith, highlights the "very generous rights" of the criminal justice system that pose challenges for trying terrorist cases: the requirement of proof beyond a reasonable doubt; the rules against hearsay coupled with the Sixth Amendment Confrontation Clause; the requirements of government disclosure of evidence that tends to exculpate the accused; the defense's right to discovery of evidence that will be used at trial; and the right to a trial that is open to the public.<sup>27</sup> These, among other rights afforded to a defendant at trial, reflect the social desire to let some guilty go free to ensure that no innocent person is wrongfully convicted. But they have no place in terrorist cases.<sup>28</sup>

The existing federal courts would need to be modified to handle these unique and complex cases, but that cannot be done without "ratcheting down justice" for civilian criminals.<sup>29</sup> Andrew

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26. Goldsmith & Katyal, *supra* note 11.

27. Chesney & Goldsmith, *supra* note 16, at 9–10.

28. *Id.* at 10.

29. McCarthy, *supra* note 15.

McCarthy, a former Chief Assistant U.S. Attorney who led the prosecution of Sheik Omar Abdel Rahman and eleven others in 1995, argues that any “[p]rinciples and precedents we create in terrorism cases generally get applied across the board.”<sup>30</sup> Consequently, the court would have to treat terrorists like everyone else, and therefore “everyone else is being treated worse.”<sup>31</sup> He concludes that “the best escape . . . [is] to concede that the existing civilian judicial system generally does not work for terrorists.”<sup>32</sup>

The world is looking to the United States to demonstrate how to bring terrorists into a system of law that protects individual rights while still effectively dealing with security threats. It is evident that neither the existing system in Guantanamo Bay nor a modification of the federal courts will offer a long-term solution.

### III. PROPOSING A NEW DETENTION SYSTEM: STRUCTURE OVERVIEW

Katyal and Goldsmith, two politically opposite national security experts, came together to propose “a bipartisan solution that reflects American values.”<sup>33</sup> Their solution not only creates the needed balance between security interests and individual interests but also assists in rebuilding the United States’ reputation.

Their proposal suggests a congressionally created system that defines the enemy, reduces burdens on the ordinary civilian courts, and specializes in dealing with alleged terrorists. Such a system would handle classified evidence, detention, and other complexities unique to terrorist cases.<sup>34</sup> Although a new court would act only as a supplement to the existing federal criminal courts, their system would serve two purposes: it would provide a closed forum to hear cases involving classified evidence and it would hear cases to preventatively detain those terrorists who have not yet committed overt crimes. Terrorists who commit overt criminal acts and whose trials do not require classified evidence should still be tried in the federal criminal system.

The base concept proposed by Katyal and Goldsmith includes limited but important details on the structure of the court system. They argue that consistency with the Constitution’s Equal Protection Clause requires Congress to apply the rules of the

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30. *Id.*

31. *Id.*

32. *Id.*

33. Goldsmith & Katyal, *supra* note 11.

34. *Id.*

system to both citizens and non-citizen terrorist detainees. Further, this new court would have a specialized bench of judges and a permanent staff of elite defense lawyers with special security clearances. In order to appropriately handle the complexities of terrorist cases, the court would not be able to offer the full panoply of criminal protections. In addition, limited public and press access would be essential in protecting classified evidence including methods and sources. Katyal and Goldsmith also propose that the decision of the court be subject to an appeal by a second lawyer before a group of specialized judges. Finally, detainment orders would require a renewal process to ensure that there is a continuing rational for detention.

Katyal and Goldsmith's call for a new, balanced solution is not unprecedented. Since 9/11, many scholars have proposed their own ideas for a better detention system. Andrew McCarthy, for example, proposed a "new judicial paradigm" in May of 2004.<sup>35</sup> Shortly thereafter, others joined in the discussion, including Glenn Sulmasy,<sup>36</sup> Robert Chesney,<sup>37</sup> A. John Radsan,<sup>38</sup> and Matthew Waxman.<sup>39</sup> What makes Katyal and Goldsmith's proposed system of detention unique is that it provides a bipartisan foundation from which the discussion in the executive and legislative branches should start.

#### A. Defining the "Enemy"

Katyal and Goldsmith urge Congress to create a definition of the enemy; however, they do not make any specific recommendations on the content of the definition. In fact, while

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35. McCarthy, *supra* note 15.

36. See Sulmasy, *supra* note 13. Glenn Sulmasy is a Professor of Law at the United States Coast Guard Academy.

37. See Chesney & Goldsmith, *supra* note 16 (analyzing the transitions of traditional military tribunals and the federal court system to accommodate trying terrorists). Robert Chesney is an associate professor at Wake Forest University School of Law specializing in national security law who spoke at William Mitchell College of Law's forum regarding post-9/11 policy on September 28, 2007.

38. See A. John Radsan, *A Better Model for Interrogating High-Level Terrorists*, 79 TEMP. L. REV. 1227 (2006). A. John Radsan is a former federal prosecutor and former Assistant General Counsel at the Central Intelligence Agency. He is currently a Professor of Law at William Mitchell College of Law.

39. See Waxman, *supra* note 18. Matthew Waxman previously served as Acting Director of the State Department's policy planning staff and as Deputy Assistant Secretary of Defense for Detainee Affairs. He currently teaches at Columbia Law School.



many commentators insist that Congress specifically define the enemy, few have proffered their own definition.<sup>40</sup> Chesney and Goldsmith emphasize that a definition of the enemy cannot be overly broad, or it will too easily permit detention and undermine the detainment system's legitimacy, but cannot be so narrow as to prevent efficient and necessary detainment.<sup>41</sup> Similar to Bush's definition of the enemy in the military commissions, Chesney and Goldsmith offer a broad definition: membership in al Qaeda and other terrorist organizations.<sup>42</sup> Although the Bush administration expanded that definition to include anyone harboring members of al Qaeda, Chesney and Goldsmith narrow it by requiring proof of an individual's direct participation in the organization.<sup>43</sup>

A. John Radsan makes a unique recommendation that avoids an extreme generalization of the enemy. He suggests that any new national security court "focus on prisoners who are truly the worst of the worst."<sup>44</sup> There should be no distinction between domestic and international terrorism, but rather all perpetrators connected "to the most significant terrorist plots" should fall within the scope of this court.<sup>45</sup> To create a well-drafted statute, Congress would need to narrow the definition of the enemy by requiring "a reasoned definition of terrorism . . . [with] a connection to an actual or potential attack," and a minimum number of victims in the plot in order to exclude "random acts of violence."<sup>46</sup>

One particularly relevant element of Radsan's proposal is a well-defined system of checks to ensure that the statutory definition of the enemy does not become too broadly applied or subjectively used. Such checks include a limitation on the number of detainees the executive branch can hold at any given time.<sup>47</sup> Radsan recommends one hundred as a reasonable total. Furthermore, Radsan proposes the creation of a "list" of high-level terrorists who, if captured, should be detained and interrogated.<sup>48</sup> Although this

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40. Without a definition of the enemy, "it is all but impossible to establish a judicial regime that meets constitutional muster." Amos N. Guiora, *Where Are Terrorists To Be Tried: A Comparative Analysis of Rights Granted To Suspected Terrorists*, 56 CATH. U. L. REV. 805, 817 (2007).

41. Chesney & Goldsmith, *supra* note 16, at 45.

42. *Id.* at 45–47.

43. *Id.*

44. Radsan, *supra* note 38, at 1232.

45. *Id.* at 1234–35.

46. *Id.* at 1236.

47. *Id.* at 1244.

48. *Id.* at 1249.

list would be highly sensitive in nature and not available to the public, it could provide an objective standard to determine if an alleged terrorist should be detained.

Defining the enemy will, and should, spur a strong debate. Creating a definition that meets the demands of bipartisan approval will be an essential first step in developing a new detention system.

### *B. Selecting Judges, Prosecutors, and Defense Attorneys*

The “Terrorists’ Court” would be composed of specialized federal judges and lawyers. Katyal and Goldsmith propose that judges chosen for the new detention system have life tenure. This provides each judge with an opportunity to become an expert on the issues peculiar to this realm, such as classified information, the laws of war, and the Geneva Conventions.<sup>49</sup> An alternative proposal by Glenn Sulmasy would require judicial candidates to be experts in the law of armed conflict.<sup>50</sup> Expertise would allow the judge to determine the lawfulness of intelligence gathering and terrorist surveillance.<sup>51</sup> Regardless of whether expert knowledge is acquired before or after appointment, it is agreed that the judge pool must be limited and serve a term long enough to specialize in national security issues.

One aspect not yet tackled by Katyal or Goldsmith is the issue of how many appointed judges this new court would require. McCarthy acknowledges that the number of judges depends on the structure of the trials.<sup>52</sup> He proposes that a single judge preside over the majority of cases and that capital cases have three or five judges.<sup>53</sup> In contrast, the FISA court, under the USA PATRIOT Act, has eleven judges to handle thousands of applications per year.<sup>54</sup> In comparison, Radsan offers that a new court would see less than a thousand cases per year, thereby making five judges “sufficient to handle the burden and to ensure impartiality through a range of

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49. McCarthy, *supra* note 15.

50. Sulmasy, *supra* note 13.

51. *Id.*

52. See McCarthy, *supra* note 15.

53. *Id.*

54. See *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT Act)*, Pub. L. No. 107-56, § 207, 115 Stat. 272, 282 (2001) (codified as 50 U.S.C. §1803(a) (2000 & Supp. IV 2004)).

views and experiences.”<sup>55</sup>

In addition to long-term judges, a permanent staff of lawyers would add expertise and legitimacy to the new system.<sup>56</sup> Those lawyers, according to Katyal and Goldsmith, would be permanent and elite with special security clearances. Sulmasy and McCarthy recommend that the Department of Justice, through a specialized unit similar to the Terrorism and Violent Crime Section, create a team of prosecutors with the discretion to determine whether to proceed in a particular case.<sup>57</sup>

Equally so, a team of defense lawyers, according to Katyal and Goldsmith, should be created and made a permanent part of the staff. These defense lawyers must not only have special security clearances, but should also be trained in “the nuances of taking apart interrogation statements, particularly translated statements” since such statements comprise the majority of evidence in terrorism cases.<sup>58</sup> Sulmasy adds that a defense team should be comprised of judge advocates that serve for the Department of Homeland Security and the Department of Defense.<sup>59</sup> The government would appoint counsel to each suspect; however, a suspect could employ and pay for his own civilian counsel if that counsel has the needed security clearance.<sup>60</sup> Although traditional detention models do not require government appointed defense counsel, Chesney and Goldsmith reason that representing the accused introduces “true adversariality” and enhances accuracy as well as legitimacy.<sup>61</sup> Radsan agrees that representation should be available. He suggests, however, that the court maintain a list of nongovernmental lawyers with appropriate security clearances, who the taxpayers will pay to defend the suspects.

### *C. Introducing Classified Evidence*

Just as the uniqueness of terrorist cases warrants special court staffing, that uniqueness also necessitates special rules for dealing with classified evidence and the media. A public proceeding could disseminate classified information into the wrong hands.

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55. Radsan, *supra* note 38, at 1245.

56. Goldsmith & Katyal, *supra* note 11.

57. McCarthy, *supra* note 15; Sulmasy, *supra* note 13.

58. Goldsmith & Katyal, *supra* note 11.

59. Sulmasy, *supra* note 13.

60. *Id.*

61. Chesney & Goldsmith, *supra* note 16, at 52.

Essentially, a failure to properly protect classified information will become an edification of terrorist organizations.<sup>62</sup> Katyal and Goldsmith call for the new court to stop the dissemination of information by dealing with classified evidence in a sensible way and limiting the public and press access to the court.<sup>63</sup>

There is a shortage of suggestions on exactly how the court can “sensibly” treat the evidence. McCarthy, however, suggests a resolution to one issue known as the “Brady Obligation.”<sup>64</sup> Under this rule, the government is required to disclose any evidence in its possession that has any tendency to exculpate the accused.<sup>65</sup> McCarthy calls for a narrower obligation where the government would only be required to disclose evidence to the defense when: (a) the prosecutor intends to introduce it at trial, and (b) the prosecutor has material, admissible evidence in its possession that actually indicates the defendant is not guilty.<sup>66</sup>

Others argue for stronger limitations, such as completely closing the court from the public and press. Citing the recent *Moussaoui* case, where the public media created a circus-like atmosphere, Sulmasy reasons that the trials and proceedings should be closed not only to prevent the dissemination of information but also to prevent the trials from becoming propaganda tools for the enemy.<sup>67</sup> He suggests the attendance of non-government organizations and the United Nations in an “observers” role to ensure procedural fairness and legitimacy during the closed trials.<sup>68</sup> Taking this suggestion further, Radsan argues that since the court would be dealing with high-level terrorists, it may be a target, and therefore the proceedings should not only be closed, but should be classified and held at a secret facility.<sup>69</sup> All participants in the court should have appropriate security clearances and the information related to the proceedings would need to be stored in a secure area.<sup>70</sup> It follows that these recommendations are the result of each authors’ inherent balancing of two competing interests: (1) rebuilding the nation’s

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62. McCarthy, *supra* note 15.

63. Goldsmith & Katyal, *supra* note 11.

64. McCarthy, *supra* note 15.

65. See Chesney & Goldsmith, *supra* note 16, at 9 n.34 and accompanying text.

66. McCarthy, *supra* note 15.

67. Sulmasy, *supra* note 13.

68. *Id.*

69. Radsan, *supra* note 38, at 1245–46.

70. *Id.*

reputation; and (2) the necessity of effective trials. The question of how to properly balance these two interests should be central to the analysis of how to structure a new "Terrorists' Court."

*D. Detainment: Implementing Procedural Protections*

Another significant factor that Congress must address is the type of procedural protections afforded to alleged terrorists. As Katyal and Goldsmith propose, the detainees "need not be given the full panoply of criminal protections."<sup>71</sup> Reduced protections might mean limited access to lawyers during interrogation or a removal of the Miranda rights requirement. McCarthy acknowledges that the determination of how many rights to afford an alleged terrorist requires a balance between individual fairness and national security imperatives.<sup>72</sup> As stated by Waxman, "we should move beyond the debate between those who say that only traditional habeas corpus rights to a fair hearing can sort out these cases and those who say that noncitizen enemy fighters captured abroad in wartime have never been entitled to their day in court."<sup>73</sup> He argues that we are all better off agreeing upon the "minimum acceptable conditions" needed to fit within the law.<sup>74</sup>

Waxman proposes that the minimum conditions needed for long-term detainment include independent judicial review of the factual basis for a detention, and a meaningful chance to challenge that factual basis with the assistance of lawyers. That factual basis, McCarthy says, should require a showing that hostilities are ongoing, and that the alleged terrorist's detainment is in the interest of national security.<sup>75</sup> Furthermore, McCarthy argues that a presumption of innocence "rebutt[able] only by proof beyond a reasonable doubt" is unnecessary and that a new court should only require the government to prove its case by a preponderance of the evidence.<sup>76</sup>

Radsan, however, suggests shifting the burdens of proof according to the duration of detainment. Within forty-eight hours of capture, the government would need to demonstrate probable cause that the suspect is a terrorist. This low burden requirement

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71. Goldsmith & Katyal, *supra* note 11.

72. McCarthy, *supra* note 15.

73. Waxman, *supra* note 18.

74. *Id.*

75. McCarthy, *supra* note 15.

76. *Id.*

would justify three months of detention. Upon expiration, the government would need to meet a higher burden of proof, such as “by clear and convincing evidence,” to renew the warrant. After six months of detainment, the government would then provide access to counsel and the suspect could challenge the government findings.

Katyal and Goldsmith urge Congress to create a review process to ensure a continuing rationale for detainment, especially when detaining a person for years after the initial case. Like Radsan’s suggested timeline, most scholars agree that a review process is necessary. McCarthy suggests a strong variation from Radsan’s recommendation. He proposes that if the government successfully shows that hostilities are ongoing and that detaining this individual is in the interest of national security, it can detain the suspect for up to three years, which would be sufficient time to allow most cases to resolve themselves.<sup>77</sup> If an individual is still detained after three years, the court would then require the government to prove the case to a higher standard, a burden that should be obtainable after three years of interrogation.<sup>78</sup> McCarthy’s suggestion does require the court to accept the government’s representations regarding this burden, and may amount to no review at all so long as the hostilities are ongoing.<sup>79</sup> Chesney and Goldsmith, on the other hand, highlight that the current military commission uses an annual review board, which releases a substantial number of detainees each year.<sup>80</sup> Although the timing is under debate, a requirement to justify ongoing detention is necessary to create the appearance and reality of a legitimate legal process.

Another measure that Katyal and Goldsmith emphasize is the right of a detainee, represented by a second lawyer, to appeal to an independent judge. This appeals process would keep the initial panel of judges “on their toes.”<sup>81</sup> Katyal and Goldsmith recommend that the appeals go to “repeat judges.”<sup>82</sup> McCarthy suggests a more expansive option: the creation of a national security appellate court whose decisions are appealable to the

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77. *Id.*

78. *Id.*

79. *Id.*

80. Chesney & Goldsmith, *supra* note 16, at 56–57.

81. Goldsmith & Katyal, *supra* note 11.

82. *Id.* “Repeat judges” refers to a panel of judges that routinely hear appeals from the “Terrorists’ Court.” *Id.*

Supreme Court.<sup>83</sup> Sulmasy, however, recommends that the Court of Appeals of the Armed Forces hears the initial appeal. This offers an “outside panel of judges versed in military law and the laws of war. . . .”<sup>84</sup> Experienced Air Force, Coast Guard, Navy-Marine Corps, and Army appellate attorneys would act as counsel for the appeal.<sup>85</sup>

Sulmasy further supports his recommendation for using the military appeals structure by suggesting that the actual detentions take place on military bases throughout the United States.<sup>86</sup> Convicted terrorists, he suggests, should be imprisoned in military briggs along with service members convicted under Uniform Code of Military Justice (UCMJ) by courts-martial.<sup>87</sup> Not only are these facilities the most secure place to imprison a person, but they also afford a terrorist the same protections against abuse provided to United States’ service members.<sup>88</sup> While Waxman generally agrees with Sulmasy, he suggests the use of ultra-secure federal prisons as well.<sup>89</sup>

#### IV. CONCLUSION

From the appointment of elite, specialized judges and lawyers to the creation of a review and appeals process, a new detention system and national security court attempts to balance the inadequacies of the two existing systems. The military commissions of Guantanamo Bay focused on the interests of national security and sacrificed the United States’ reputation as a nation of fair and humane legal treatment. While the federal criminal courts provide fair treatment needed to rebuild the reputation, they are ill equipped to handle most terrorist cases without putting the nation at risk.

Recognizing this dilemma, Neal Katyal worked not only to persuade the United States Supreme Court from supporting the executive-created military commissions, but has also joined with his political opposite to move the nation as a whole into discussions of a new long-term solution. Katyal and Goldsmith’s proposal creates

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83. McCarthy, *supra* note 15.

84. Sulmasy, *supra* note 13.

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.*

89. Waxman, *supra* note 18.

a common ground that should act as a springboard for legislative discussions. It is time for our nation to have terrorist trials and detentions we can be proud of. It is time for trials that show our allies and foes alike how the United States is a fair and just nation that treats all people equally, and can do so without sacrificing the nation's security.

When Katyal told Hamdan that America does not treat people differently because of where they come from, he believed it. Now, Neal Katyal has put before our nation the framework of a new system to make that belief a reality.



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